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C O N F I D E N T I A L SECTION 01 OF 02 HONG KONG 000192

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SUBJECT: MACAU ARTICLE 23 LEGISLATION: THE GOOD NEWS IS,
IT'S IN THE HANDS OF THE COURTS

REF: (A) 08 HONG KONG 2258 (B) 08 HONG KONG 2109

Classified By: Consul General Joe Donovan for reasons 1.4 (b) and (d)

11. (C) Summary and comment: Macau Law Reform Officer Director Chu Lam-lam, who drafted the text of Macau's Article 23 national security bill, walked us through existing Macau law to demonstrate the bill's secrecy provisions would not pose a risk to journalists. She stressed that courts will have discretion to weigh the public interest in disclosure of classified information against the harm to national security. Chu also maintained that "preparatory acts" can only be prosecuted as crimes if both the persons involved intended to eventually commit a crime and their preparations would actually allow them to do so. If Macau judges share Chu's view of how existing law should apply to Article 23, the eventual law may not be as great a risk to human rights as some observers had feared. The question is whether, in a system in which the language of law is deliberately general and precedent is not binding, the courts will decide in the fashion Chu describes, and how consistently they will rule (upcoming septel). End summary and comment.

Letter of the Law

12. (C) On January 9, we met with Director of Macau's Law Reform Office Ms. Chu Lam-lam, who wrote the draft of Macau's Article 23 national security bill which went to the Legislative Assembly. Chu began by explaining that civil law texts lack the exhaustive definition and detail of common law legislation. For purposes of Macau law, she explained, any criminal law on a specific topic (in addition to Article 23 legislation, she mentioned Macau's anti-terrorism and anti-money laundering laws), has as points of departure the Macau Criminal Code (Code Penal) and the Macau Criminal Procedure Code. Thus, although the bill might not specifically refer to the Code Penal, if the terminology used for a point of law is the same, then the Code Penal (and the existing jurisprudence interpreting it) will guide judges in Article 23 cases. In this sense, laws like Article 23, the anti-terrorism law, and the anti-money laundering law might best be understood as explanations of how the Code Penal is applied with respect to those particular crimes.

Secrecy

13. (C) Regarding crimes of divulging state secrets as they might affect journalists, Chu said that, in addition to the actual fact of a disclosure, two standards must be met. First, the act must be intentional, and second, the act must harm state security. Chu argued that, unless a journalist knowingly and deliberately sought access to material s/he knew to be classified, s/he could not be charged with "prying into" (ci tan) state secrets. She reiterated comments she

made to the press that, since only the government held state secrets, only a government official could be charged with disclosure of a secret. Chu also stated that a journalist could not be held liable were s/he given information which was not specifically marked or described as classified. Chu also told us it is not legal to classify material to cover up a crime, although she did not cite which Macau law makes that point.

¶4. (C) Ref A noted that the Article 23 bill language on how courts would seek advice from the government as to whether information was classified had changed from "should obtain certification" to "may obtain certification". We previously interpreted this change as giving the court discretion to consider whether some unmarked material might or might not constitute a secret. Chu explained to us, however, that should the prosecution argue that some material in the case was classified, the court would be obligated to seek a ruling from the government. As reported previously, the revised Article 23 bill text requires that the information have been classified prior to its disclosure.

¶5. (C) Chu told us very clearly that, under the terms of the current Article 23 bill, the Macau judge will have the sole discretion to decide whether the disclosure harms state security.

¶6. (C) Comment: Article 5.1.c of the Macau Law on Publications (1990) bars journalists from approaching their sources for classified information. This appears to track with Chu's explanation of the "intentionality" standard to be imposed under Article 23 legislation. The question becomes

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then, if the journalist did not specifically seek classified information but was given material marked classified unasked, does s/he have the right to publish it? The Publications Law does not directly address this. The current Article 23 bill seems to suggest that to publish classified information intentionally could be a crime.

Public Interest Defense

¶7. (C) As reported ref B, Macau's existing doctrine of public interest defense is in Articles 30, 31, 33 and 35 of the Code Penal. Article 30 defines a concept of "legitimate or justified defense", which Chu and Macau University Law Professor Luo Weijian (ref B) argued provides a public interest defense for journalists disclosing classified information. Article 31 justifies actions to fend off infringements of one's own or another's lawfully protected interests, providing the methods used are shown to be necessary to block the infringement. Article 33 adds the right to avoid imminent danger, with the requirement that harm caused by the "defensive" action must be less than the harm which would be caused by inaction. Article 35 grants an exception to persons not fulfilling their official duties or disobeying the orders of authorities in cases in which obedience would cause greater harm than disobedience. It further allows officials the right to disobey their superior's orders should those orders involve committing a crime. All of these points, Chu argues, would allow a judge the discretion to balance the public good achieved by disclosure of classified information against the harm caused to the state.

¶8. (C) Comment: We have no basis to comment on how willing Macau judges are to consider "justified defense" for other crimes, and thus cannot predict whether it will be a key doctrine guiding Article 23 cases. However, the language in Articles 31 and 33 both implies that the justifiable action is taken against a threat to oneself or others that is either imminent or in progress. This may be a difficult standard to meet for an investigative journalist uncovering a political

scandal which is neither in progress at that moment nor can be shown to directly threaten anyone.

Preparatory Acts

¶9. (C) Chu told us "preparatory acts" under Macau law are not the same as the common law concept of "conspiracy". She also pointed out that, under Article 20 of the Code Penal, preparatory acts can only be a crime if specifically stated in the law. Articles 297-299 of the Code Penal specifically criminalize only acts in preparation to use violence to disrupt or change the existing order in Macau, or otherwise cause destruction. The language in the Article 23 bill is similar. Chu said two standards would need to be met to declare preparatory acts to be criminal. First, the perpetrator would have to have the intention of committing the act for which it were alleged s/he was preparing. Second, the preparatory actions themselves would need to credibly allow the perpetrator to commit the criminal act.

¶10. (C) Comment: Chu's point to us was that talking about something doesn't make it possible to achieve. If this is the approach that the Macau judiciary will take to Article 23 cases, much of the concern that activists calling for political change in either the Macau or Mainland governments could be charged with preparing for subversion would seem unfounded. Since the definitions for the remaining crimes in the Article 23 bill for which preparatory acts are also crimes -- treason, secession, and subversion -- specify acts of violence, presumably meeting Chu's credibility standard would require actions in physical preparation to commit violent acts, such as seeking to purchase or gathering weapons.
DONOVAN